

Darrell L. Olson (SBN 77,633)
 Darrell.Olson@kmob.com
 Lynda J. Zadra-Symes (SBN 156,511)
 Lynda.Zadra-Symes@kmob.com
 Jeffrey L. Van Hoosear (SBN 147,751)
 Jeffrey.VanHoosear@kmob.com
 David G. Jankowski (SBN 205,634)
 David.Jankowski@kmob.com
 KNOBBE, MARTENS, OLSON & BEAR
 2040 Main Street, Fourteenth Floor
 Irvine, California 92614
 Phone: (949) 760-0404
 Facsimile: (949) 760-9502

David A. Robinson (SBN 107,613)
 drobinson@enterprisecounsel.com
 James S. Azadian (SBN 225,864)
 jazadian@enterprisecounsel.com
 ENTERPRISE COUNSEL GROUP ALC
 Three Park Plaza, Suite 1400
 Irvine, California 92614
 Phone: (949) 833-8550
 Facsimile: (949) 833-8540

Attorneys for Defendant/Counter-Plaintiff,
 KEATING DENTAL ARTS, INC.

IN THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DISTRICT

JAMES R. GLIDEWELL DENTAL
 CERAMICS, INC. dba GLIDEWELL
 LABORATORIES,

Plaintiff,

v.

KEATING DENTAL ARTS, INC.

Defendant.

AND RELATED COUNTERCLAIMS.

Civil Action No.
 SACV11-01309-DOC(ANx)

Honorable David O. Carter

**DEFENDANT AND COUNTER-
 PLAINTIFF KEATING
 DENTAL ARTS, INC.'S
 OMNIBUS OPPOSITION AND
 RESPONSE TO PLAINTIFF
 AND COUNTER-DEFENDANT
 JAMES R. GLIDEWELL
 DENTAL CERMANICS, INC.'S
 MOTIONS *IN LIMINE* NOS. 1-4**

Trial Date: February 26, 2013
 Time: 8:30 a.m.
 Location: Courtroom 9D

TABLE OF CONTENTS

Page No.

I.	GLIDEWELL'S MOTION <i>IN LIMINE</i> NO. 1 SHOULD BE DENIED BECAUSE EVIDENCE FROM THE PERIOD AFTER APRIL 2011 IS RELEVANT TO THE DETERMINATION OF GENERICNESS.....	1
II.	GLIDEWELL'S MOTION <i>IN LIMINE</i> NO. 2 SHOULD BE DENIED BECAUSE KEATING CAN AND WILL AUTHENTICATE THE WEB-PAGES AT ISSUE.....	4
A.	Website Printouts May Be Authenticated By The Proponent Attorney Declaring That S/He Accessed The Website And Printed The Documents.....	5
B.	Glidewell's Cases Are Conspicuously Distinguishable Because They Each Stand For Propositions Inapplicable To This Case.	7
C.	Keating's Counsel and Dr. Eggleston Had, and Continue to Have, the Personal Knowledge Necessary to Authenticate the Website Printouts Because They Personally Accessed the Websites.	10
D.	The Web-Page Printouts Are Not Hearsay Because They Are Not Being Offered To Prove The Truth Of The Matter Asserted	11
E.	Keating's Web-Page Printouts Are Not Irrelevant Merely Because They May be Dated after April of 2011	12
III.	GLIDEWELL'S MOTION <i>IN LIMINE</i> NO. 3 SHOULD BE DENIED BECAUSE DR. EGGLESTON'S TESTIMONY IS PROPER UNDER FEDERAL RULE OF EVIDENCE 702	12
A.	Dr. Eggleston's Testimony is Relevant To the Issue of BruxZir's Genericness.....	12
B.	Dr. Eggleston's Testimony Is Based on Reliable and Authenticated Sources	15
C.	The Probative Value of Dr. Eggleston's Testimony Outweighs Any Prejudicial Effect on Glidewell	16
D.	Dr. Eggleston Provided Testimony Directly Relevant to the Issue of Likelihood of Confusion.....	17
IV.	GLIDEWELL'S MOTION <i>IN LIMINE</i> NO. 4 SHOULD BE DENIED BECAUSE LORI BOATRIGHT'S TESTIMONY IS PROPER UNDER FEDERAL RULE OF EVIDENCE 702	18

TABLE OF CONTENTS
(*cont'd*)

		Page No.
1		
2		
3		
4	A. Boatright Did Not Misapply The TMEP	18
5	B. Boatright's Testimony is Not Unsupported Speculation	20
6	C. Boatright's Testimony is Relevant To the Issue of	
7	BruxZir's Genericness	21
8	D. The Probative Value of Boatright's Testimony	
9	Outweighs Any Prejudicial Effect on Glidewell	22
10	E. Boatright Provided Testimony Directly Relevant to the	
11	Issue of Likelihood of Confusion.....	23
12	V. CONCLUSION	24
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Page No(s).

1		
2		
3		
4	<i>AMF Inc. v. Sleekcraft Boats</i> ,	
5	599 F.2d 341 (9th Cir. 1979).....	17, 18
6	<i>Burger King Corp. v. Pilgrim's Pride Corp.</i> ,	
7	705 F. Supp. 1522 (S.D. Fla. 1988).....	3, 14, 22
8	<i>Committee for Idaho's High Desert v. Yost</i> ,	
9	92 F.3d 814 (9th Cir. 1996).....	3, 14, 22
10	<i>Costa v. Keppel Singmarine Dockyard PTE, Ltd.</i> ,	
11	No. CV 01-11015MMM, 2003 WL 24242419	
12	(C.D. Cal. April 24, 2003)	9
13	<i>Daubert v. Merrell Dow Pharms., Inc.</i> ,	
14	509 U.S. 579 (1993).....	16
15	<i>Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc.</i> ,	
16	198 F.3d 1143 (9th Cir. 1999).....	3, 14, 22
17	<i>In re Homestore.com, Inc. Sec. Litig.</i> ,	
18	347 F. Supp. 2d 769 (C.D. Cal. 2004).....	8
19	<i>In re Noble Co.</i> ,	
20	225 USPQ 749 (TTAB 1985).....	19, 20
21	<i>Internet Specialties West, Inc. v. ISPWEST</i> ,	
22	No. CV 05-3296 FMC AJWx, 2006 WL 4568796	
23	(C.D. Cal. Sept. 19, 2006).....	8, 9
24	<i>Jarritos, Inc. v. Los Jarritos</i> ,	
25	C05-02380 JSW, 2007 WL 1302506	
26	(N.D. Cal. May 2, 2007)	<i>passim</i>
27	<i>Jarritos, Inc. v. Reyes</i> ,	
28	345 Fed. Appx. 215 (9th Cir. 2009)	5, 6
	<i>Nightlight Sys., Inc., v. Nitelites Franchise Sys., Inc.</i> ,	
	2007 WL 4563873 (N.D. Ga. 2007).....	3, 14, 22

TABLE OF AUTHORITIES

(cont'd)

	Page No(s).
<i>Orr v. Bank of America NT & SA</i> , 285 F.3d 764 (9th Cir. 2002).....	5
<i>Osborn v. Butler</i> , 712 F. Supp. 2d 1134 (D. Idaho 2010)	10
<i>Perfect 10, Inc. v. Cybernet Ventures, Inc.</i> , 213 F. Supp. 2d 1146 (C.D. Cal. 2002)	6, 7, 10, 15
<i>Premier Nutrition, Inc. v. Organic Food Bar, Inc.</i> , No. SACV 06-0827 AG(RNBx), 2008 WL 1913163 (C.D. Cal. March 27, 2008).....	7
<i>Rearden LLC v. Rearden Commerce, Inc.</i> , 597 F. Supp. 2d 1006 (N.D. Cal. 2009), overruled on other grounds, 683 F.3d 1190 (9th Cir. 2012)	6, 9, 10, 15
<i>Ty Inc. v. Softbelly's Inc.</i> , No. 00 C 5230, 2006 WL 5111124 (N.D. Ill Apr. 7, 2006)	16
<i>United States v. Tank</i> , 200 F.3d 627 (9th Cir. 2000).....	6, 7, 15
<i>Wady v. Provident Life. Wady v. Provident Life and Accident Ins. Co. of Am.</i> , 216 F. Supp. 2d 1060 (C.D. Cal. 2002)	8, 9
<i>Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.</i> , 419 F.3d 925 (9th Cir. 2005).....	passim

OTHER AUTHORITIES

Fed. R. Evid. 702	12, 13, 18, 21
Fed. R. Evid. 703	16, 17
Fed. R. Evid. 801	11
Fed. R. Evid. 401	2

TABLE OF AUTHORITIES
(*cont'd*)

	Page No(s).
Fed. R. Evid. 403	4
37 C.F.R. §2.61.....	19
Trademark Manual of Examining Procedure (“TMEP”)	19
2 J. Thomas McCarthy, Trademarks and Unfair Competition (4th ed. 1997).....	3, 14, 22

1 In light of the highly abbreviated time period for Defendant and Counter-
 2 Plaintiff Keating Dental Arts, Inc. (“Keating”) to oppose the nine motions *in*
 3 *limine* filed late last night by Defendant James R. Glidewell Dental Ceramics,
 4 Inc. (“Glidewell”), Keating hereby files this consolidated Omnibus Opposition
 5 and Response to Glidewell’s Motion *In Limine* Nos. 1–4.¹

6 **I. GLIDEWELL’S MOTION *IN LIMINE* NO. 1 SHOULD BE DENIED**
 7 **BECAUSE EVIDENCE FROM THE PERIOD AFTER APRIL 2011 IS**
 8 **RELEVANT TO THE DETERMINATION OF GENERICNESS**

9 Glidewell cites *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk*
 10 *Grove, Inc.*, 419 F.3d 925, 928 (9th Cir. 2005) for the proposition that the
 11 “crucial date for the determination of genericness is the date on which the
 12 alleged infringer entered the market with the disputed mark or term.” Glidewell
 13 argues any evidence as to the genericness of Glidewell’s mark “BruxZir” dated
 14 after April of 2011—the date Glidewell asserts Keating introduced its all-
 15 zirconia product into the market under the KDZ Bruxer name—is irrelevant and
 16 should be excluded from trial. (Glidewell’s MIL No. 1 at 1-2.) Specifically,
 17 Glidewell seeks to exclude third-party website printouts, the testimony of Carol
 18 Frattura (Docket Nos. 96 & 118), prescription forms from Showcase Dental
 19 (Docket No. 96), the testimony of thirteen third-party dentists (Docket Nos. 97-
 20 109), and prescription forms submitted to Keating (Docket Nos. 90-4 (Ex. 15),
 21 195) because Glidewell argues that this evidence does not address whether the
 22 term “BruxZir” was generic as of April 2011. (*Id.* at 3-5.)

23 For multiple reasons, Glidewell’s argument that evidence of genericness
 24 dated after April 2011 is irrelevant is meritless. First, Glidewell wrongly
 25 assumes April 2011 as the date when Keating began commercializing an all-
 26 zirconia crown using the KDZ Bruxer name. In fact, Keating did not begin

27 ¹ Keating presents its opposition and response to Glidewell’s Motion *In Limine*
 28 Nos. 5–9 in a separate document filed concurrently herewith.

1 selling product under that name until May 10, 2011. Therefore, Keating's
 2 evidence up to and including May 10, 2011 (which Glidewell seeks to exclude
 3 through its motion) plainly falls within the "crucial date" for determination of
 4 genericness.

5 Second, despite Glidewell's claims to the contrary, *Yellow Cab* stands
 6 only for the proposition that the "crucial date" for determining genericness is the
 7 date the alleged infringer introduced his competing product. *Yellow Cab Co. of*
 8 *Sacramento*, 419 F.3d at 928. The Ninth Circuit did not hold that evidence
 9 dated after the "crucial date" could not be used to prove genericness on the
 10 "crucial date," or that any evidence dated after the "crucial date" was irrelevant.
 11 Indeed, Glidewell fails to cite any case where a court excluded evidence dated
 12 after the "crucial date" as irrelevant to the determination of genericness at the
 13 time of the "crucial date."

14 Under Rule 401, evidence is relevant if it has any tendency to make a fact
 15 of consequence more or less probable than it would be without the evidence.
 16 Fed. R. Evid. 401. "Any tendency" makes a finding of relevance very easy to
 17 meet, and Keating's evidence meets that standard here.

18 Evidence dated after the "crucial date" is relevant to the extent it
 19 corroborates prior evidence.² For example, post-May 2011 evidence can show
 20 that after Keating's entry into the market and after start of this litigation,
 21 Glidewell failed to properly police the use of its mark. This tends to show that
 22 Glidewell has consistently failed to monitor the use of its mark and that it has
 23 not changed any of its practices. The finder of fact can use this to support a

24 ///

25 ² Glidewell's claim that there is no prior corroborative evidence is directly
 26 contradicted by footnote 3 of Glidewell's Motion *in limine* No. 3, where
 27 Glidewell admits there are at least two documents evidencing the genericness of
 28 the terms "BruxZir" and "bruxer" before April 2011: (1) a website posting from
 Pittman Dental Lab dated November 29, 2010 (Docket No. 93, Ex. 120); and (2)
 a prescription from Mascola Esthetics in San Antonio (Docket No. 93, Ex. 110).

1 finding that the BruxZir mark, or its phonetic equivalent, has been generic for so
2 long that Glidewell has no ability to salvage the mark.

3 Establishing a comprehensive timeline of the use of the BruxZir name is
4 also relevant to understanding the status of BruxZir at the time of Keating's
5 entry into the market. As detailed in Keating's Reply Memorandum of Points
6 and Authorities in Support of Defendant's Motion for Summary Judgment
7 Cancelling Glidewell's Trademark Registration (Docket No. 132), evidence
8 dated after the crucial genericness date is still relevant to the analysis of
9 genericness. Expert surveys, for example, are necessarily dated after the onset
10 of litigation (and therefore after the crucial date), but nevertheless are relied
11 upon considerably in trademark cases. *Committee for Idaho's High Desert v.*
12 *Yost*, 92 F.3d 814, 822 (9th Cir. 1996) ("survey evidence is . . . one of the most
13 persuasive ways to prove secondary meaning"); *see also Filipino Yellow Pages,*
14 *Inc. v. Asian Journal Publ'ns, Inc.*, 198 F.3d 1143, 1151 (9th Cir. 1999)
15 ("Secondary meaning can be established in many ways, including (but not
16 limited to) . . . survey evidence See 2 J. Thomas McCarthy, Trademarks
17 and Unfair Competition § 15:30 (4th ed. 1997)); *Nightlight Sys., Inc., v. Nitelites*
18 *Franchise Sys., Inc.*, 2007 WL 4563873 (N.D. Ga. 2007) (finding that
19 deficiencies in the timeliness of a survey does not necessarily bar its
20 admissibility); *see also Burger King Corp. v. Pilgrim's Pride Corp.*, 705 F.
21 Supp. 1522, 1525 (S.D. Fla. 1988) (holding that a survey taken after the crucial
22 date may not have its validity challenged for that reason).³

23 ³ Glidewell claims *Nightlight Sys., Inc.* and *Burger King Corp.* are inapposite,
24 because the 11th Circuit does not follow the "crucial date" principle. However,
25 regardless of whether the 11th Circuit follows the "crucial date" principle, these
26 cases demonstrate that surveys (which are necessarily created after the crucial
27 date) can still be persuasive indicators of genericness at a date prior to the
28 survey. Furthermore, Glidewell criticizes these decisions, but fails to cite a
single Ninth Circuit case to support its theory. Notably, Glidewell makes no
attempt to address *Committee for Idaho's High Desert*, a Ninth Circuit case,
which also indicates that surveys (one example of evidence dated after the
crucial date) are persuasive indicators of genericness or lack of secondary
meaning. 92 F.3d at 822. Moreover, as previously noted, Glidewell simply

1 Glidewell also objects that exposing the fact finder to evidence dated after
 2 the crucial date may unfairly prejudice Glidewell and mislead the jury by
 3 causing them to determine genericness at the incorrect time period.
 4 (Glidewell's MIL No. 1 at 7:24-8:5.) However, once the Court decides the
 5 "crucial date" for determining genericness (i.e., May 10, 2011, the date Keating
 6 began selling its bruxer product), the Court will communicate that to the trier of
 7 fact, who is to readily abide by that date. Contrary to Glidewell's suggestion,
 8 organizing two time frames is not complicated or beyond the abilities of the
 9 average person.

10 Likewise, Glidewell misses the point in arguing that Keating's evidence
 11 would confuse and mislead the fact finder so substantially as to outweigh the
 12 probative value of the evidence under Federal Rule of Evidence ("F.R.E.") 403.
 13 (Glidewell's MIL No. 1 at 8:6-15.) Again, there are only two timeframes at
 14 issue—before Keating's entry into the market and after Keating's entry into the
 15 market. It is unlikely that anyone would find that confusing, and Glidewell does
 16 not elaborate beyond its conclusory objection.

17 For the foregoing reasons, Glidewell's Motion *In Limine* No. 1 should be
 18 denied.

19 **II. GLIDEWELL'S MOTION *IN LIMINE* NO. 2 SHOULD BE DENIED**
 20 **BECAUSE KEATING CAN AND WILL AUTHENTICATE**
 21 **THE WEB-PAGES AT ISSUE**

22 Glidewell seeks to exclude evidence or argument relating to web-page
 23 printouts from sources other than the parties or Authorized BruxZir Labs.
 24 Specifically, Glidewell argues that such web-pages (1) cannot be authenticated
 25 by a person with personal knowledge; (2) are inadmissible hearsay; and (3) are
 26

27 ignores the Ninth Circuit's express holding in *Yellow Cab* that the "crucial date"
 28 for determining genericness is the date the alleged infringer introduced his
 competing product. 419 F.3d at 928.

1 irrelevant because they are dated after April of 2011. As described in detail
 2 below, Glidewell misstates and misapplies the appropriate law. According to
 3 the proper application of the law, the web-pages can be properly authenticated
 4 by any competent witness with personal knowledge of the content of the web-
 5 page printouts, including Keating's expert witnesses or attorneys. Because
 6 Keating has competent witnesses testifying to the authenticity of the web page
 7 print outs, the Court should deny Glidewell's Motion *In Limine* No. 2.

8 **A. Website Printouts May Be Authenticated By The Proponent Attorney**
 9 **Declaring That S/He Accessed The Website And Printed The**
 10 **Documents**

11 The authentication requirement is satisfied when “the trial judge
 12 determines that there is . . . evidence sufficient to support a finding that the
 13 matter in question is what its proponent claims.” *Jarritos, Inc. v. Reyes*, 345
 14 Fed. Appx. 215, 218 (9th Cir. 2009) (quoting *Orr v. Bank of America NT & SA*,
 15 285 F.3d 764, 773, n.6 (9th Cir. 2002)). With respect to authentication of
 16 websites printouts, the trial court practice is to allow authentication by
 17 declaration of the individual who accessed the website.

18 For example, the trial court in *Jarritos, Inc. v. Los Jarritos* held that a
 19 mere explanation by the plaintiff's counsel was sufficient to authenticate a
 20 website printout. *Jarritos, Inc. v. Los Jarritos*, C05-02380 JSW, 2007 WL
 21 1302506 at *10 (N.D. Cal. May 2, 2007) (overruled on other grounds, *Jarritos*,
 22 *Inc.*, 345 Fed. Appx. 215). On a motion for summary judgment, the plaintiff
 23 offered a printout of the defendant's website to show that the defendant was
 24 improperly using plaintiff's trademark. The trial court found that the websites
 25 were properly authenticated when the plaintiff's counsel explained that he
 26 personally typed in the web address, accessed the website, and printed the page.
 27 The explanation was provided in the plaintiff's response to the evidentiary
 28 objections, and was sufficient to overcome the objection. *Id.* at *10.

1 Glidewell repeatedly asserts the undisputed point that there needs to be
 2 authentication by someone with “personal knowledge of the contents of the
 3 various webpages” (Glidewell’s MIL No. 2 at 6:2-3), but Glidewell then
 4 provides an improper definition of “personal knowledge.” Glidewell suggests
 5 that someone with “personal knowledge” must be someone actually affiliated
 6 with the website or even “owners of those websites.” (*Id.* at 1:13-14.)

7 There is no foundation for Glidewell’s inventive limitation, and courts
 8 have rejected this argument. For example, in *Rearden v. Rearden Commerce*,
 9 the trial court dismissed this argument, remarking:

10 Each of the denied objections is based upon the nonsensical
 11 proposition that an attorney cannot authenticate a print-out from
 12 a publicly accessible website. Plaintiffs repeatedly object that
 13 [the attorney] ‘has no personal knowledge of any of the
 14 information contained’ in the exhibits. [The attorney’s]
 15 declarations are not offered for the purposes of testifying to the
 16 substance of the various news articles and documents—they are
 offered to authenticate the source of those documents, i.e., that
 they were actually downloaded from the internet addresses
 indicated.

17 *Rearden LLC v. Rearden Commerce, Inc.*, 597 F. Supp. 2d 1006, 1027 (N.D.
 18 Cal. 2009), overruled on other grounds, 683 F.3d 1190 (9th Cir. 2012).⁴

19 Other courts have agreed with the *Rearden* court. For example, in *Perfect*
 20 *10, Inc. v. Cybernet Ventures*, the court found that website printouts were
 21 sufficiently authenticated simply where the proponent declared that they were
 22 “true and correct copies of pages printed from the Internet that were printed by
 23 [the proponent] or under his direction.” *Perfect 10, Inc. v. Cybernet Ventures*,
 24 *Inc.*, 213 F. Supp. 2d 1146, 1153-54 (C.D. Cal. 2002) (citing *United States v.*

25 ⁴ Instead of addressing the merits of *Rearden*, Glidewell merely states that
 26 *Rearden* does not address Glidewell’s *ipse dixit* or Glidewell’s handful of
 27 inapposite authorities and that, on this basis alone, this Court should disregard
 28 *Rearden* as unpersuasive. (Glidewell’s MIL No. 2 at 4:18-22.) Glidewell
 makes the same circular claim regarding *Jarritos*, without addressing the merits
 or facts of the case. (*Id.* at 4:11-15.)

1 *Tank*, 200 F.3d 627, 630 (9th Cir. 2000)) (holding followed by *Premier*
 2 *Nutrition, Inc. v. Organic Food Bar, Inc.*, No. SACV 06-0827 AG(RNBx), 2008
 3 WL 1913163 at *6 (C.D. Cal. March 27, 2008). The court found it additionally
 4 persuasive that “computer printouts [were] the only practical method by which
 5 the allegations of the complaint [could] be brought before the Court,”
 6 suggesting that requiring anything more to authenticate the documents would be
 7 impracticable, especially given the number of website pages produced. *Id.* at
 8 1154.

9 Each of these cases describes and confirms the routine trial court practices
 10 in admitting website printouts as evidence. Proper authentication of the web-
 11 page printouts is as simple as a declaration from the attorney (provided even in
 12 response to an objection) that the attorney printed the page from the website
 13 address and did not alter the form of the page maintained at the website address.

14 **B. Glidewell’s Cases Are Conspicuously Distinguishable Because They**
 15 **Each Stand For Propositions Inapplicable To This Case.**

16 The law is well settled that authenticating web-page printouts takes
 17 nothing more than a declaration from the person printing out the web pages
 18 from the website address/domain. Glidewell points to a smattering of cases
 19 attempting to support Glidewell’s *ipse dixit* that an employee of the website
 20 holder must authenticate the printouts, but Glidewell fails to disclose the *narrow*
 21 circumstances to which each of these cases apply.

22 Glidewell’s collection of cases all fall within a narrow exception to the
 23 general rule of web-page authentication. That narrow exception does not apply
 24 here. Specifically, those cases reason that when a *party* offers the website
 25 printout as a statement of the *other party*, then a higher showing of
 26 authentication is needed. In each case cited by Glidewell, the proponent offered
 27 the website printouts effectively as evidence of statements made by the adverse
 28 party.

1 In the matter of *Homestore.com*, the plaintiffs tried to use earnings
 2 statements and press releases downloaded from the defendant's website as
 3 evidence for their claims of fraud in the defendant's accounting practices. *In re*
 4 *Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769 (C.D. Cal. 2004). The
 5 trial court concluded that such documents, *which otherwise may be self-*
 6 *authenticating*, could not be *self-authenticating* when downloaded from a
 7 website. *Id.*, at 782-83. Because the documents were offered as a
 8 communication made by the defendant to the public, the trial court required a
 9 heightened level of authentication that the statements in the document were in
 10 fact made by the defendant. *Id.* at 782-83. It is also important to note that those
 11 printouts were not being used by the plaintiffs merely to show that the earnings
 12 and press releases were on the website, but rather to prove the intricate details
 13 contained therein.

14 The very same narrow circumstances apply in *Wady v. Provident Life*.
 15 *Wady v. Provident Life and Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060
 16 (C.D. Cal. 2002). In that case, the plaintiff sought to use printouts from the
 17 defendant's website as the defendant's statements. *Id.* at 1064. The trial court
 18 required a heightened standard of authentication for the printouts when used for
 19 that purpose, because it had to be shown that the defendant actually authored the
 20 statements in the documents. *Id.* at 1064. Contrary to Glidewell's
 21 representation, the trial court did not deem the documents inadmissible merely
 22 because they were printouts from a website.

23 Although the trial court's opinion in *Internet Specialties West v.*
 24 *ISPWEST* is factually bare, it is readily understood that the trial court in that
 25 case relied exclusively on *Wady* and *In re Homestore.com*, which, as established
 26 above, are factually distinct from this case. *Internet Specialties West, Inc. v.*
 27 *ISPWEST*, No. CV 05-3296 FMC AJWx, 2006 WL 4568796 (C.D. Cal. Sept.
 28 19, 2006). Significantly, the *Internet Specialties West* trial court did note that

1 “[c]ertainly, a qualified expert may rely on information he obtained off the
2 internet, even if hearsay, in forming his opinions.” *Id.* at *1.

3 The final case relied on by Glidewell is likewise distinguishable. In
4 *Costa v. Keppel Singmarine Dockyard*, the plaintiff offered printouts from the
5 defendant’s website as evidence of the defendant’s corporate structure, which
6 was at issue in the case. *Costa v. Keppel Singmarine Dockyard PTE, Ltd.*, No.
7 CV 01-11015MMM, 2003 WL 24242419 (C.D. Cal. April 24, 2003). The web
8 pages were being used essentially as a statement and admission of the defendant
9 regarding its corporate structure. *Id.* at *7, n. 74. Accordingly, the trial court
10 found that there needed to be some authentication that these were in fact
11 statements of the defendant before holding the defendant liable for those
12 statements, citing *Wady*. *Id.* at n. 74.

13 In each of Glidewell’s cases, a party sought to use website content against
14 the other party as a statement made by that other party. In each case, the court
15 deemed it important to establish the identity of the author of the statements
16 accessed on the website (which often required authentication by someone from
17 the party’s company). That is not the case here. Keating is not using the
18 website evidence to prove statements made by Glidewell, or to prove that any
19 statements on the third party websites are true. Keating is using the third party
20 website printouts to show the manner in which words are used, including the
21 BruxZir mark, within web pages presented by companies in the dental industry.
22 The websites establish, for example, the existence of companies in the dental
23 field using the BruxZir mark on their websites without attributing any
24 connection to Glidewell. It is the mere fact that these web-pages exist that is
25 relevant to Keating’s position. *Rearden LLC*, 597 F. Supp. 2d at 1027.

26 For the third-party web pages relied on by Keating, the well settled
27 standard for authenticating web printouts applies—the web documents may be
28 authenticated by anyone with competent personal knowledge about the accuracy

1 of the document as compared to the website pages. This may be provided, for
 2 example, by declaration, such as those filed in support of Keating's summary
 3 judgment motions.

4 **C. Keating's Counsel and Dr. Eggleston Had, and Continue to Have, the**
 5 **Personal Knowledge Necessary to Authenticate the Website Printouts**
 6 **Because They Personally Accessed the Websites.**

7 As detailed in their declarations filed in support of Keating's Summary
 8 Judgment Motions, Keating's counsel, Messrs. Rustin Mangum Nathan Wenk,
 9 and Keating's expert witness, Dr. David Eggleston, have the personal
 10 knowledge necessary to authenticate the third-party website printouts. (Docket
 11 Nos. 135, 138, 139.) It is well established that the individual who accesses the
 12 website and prints out the pages has the "personal knowledge" to authenticate
 13 the printouts. *Rearden LLC*, 597 F. Supp. 2d at 1027 (finding plaintiff's
 14 argument that an attorney cannot authenticate a publicly accessible website
 15 "nonsensical"); *see also Osborn v. Butler*, 712 F. Supp. 2d 1134, 1146 (D.
 16 Idaho 2010); *Jarritos*, 2007 WL 1302506 at *10.

17 Messrs. Mangum and Wenk personally accessed the web pages,
 18 personally printed them out, and have verified that they have not made any
 19 changes to the printouts. They have additionally provided a detailed account of
 20 the web addresses of each of the website printouts as well as when the website
 21 was accessed and the printout created. *Osborn v. Butler*, 712 F. Supp. 2d 1134,
 22 1146 (D. Idaho 2010); *Jarritos*, 2007 WL 1302506 at *10; *Perfect 10*, 213 F.
 23 Supp. 2d at 1153-54.

24 Similarly, Dr. Eggleston has verified that he has visited each of the
 25 websites and confirmed that the web-page printouts are the same as the websites
 26 he accessed. He has provided a detailed account of the web addresses, the
 27 actions taken, and the dates he accessed them. (Docket No. 135.) Accordingly,
 28 the personal knowledge condition for authentication of the website printouts is

1 satisfied. Moreover, the declarations from Messrs. Mangum and Wenk and Dr.
 2 Eggleston include the information necessary to authenticate the website
 3 printouts. See *Jarritos*, 2007 WL 1302506 at *10 (finding that the plaintiff's
 4 counsel properly and timely authenticated the documents when his explanation
 5 was produced in response to the defendant's evidentiary objections).

6 **D. The Web-Page Printouts Are Not Hearsay Because They Are Not**
 7 **Being Offered To Prove The Truth Of The Matter Asserted**

8 Glidewell objects to the website printouts as hearsay. To be considered
 9 hearsay, the party offering the evidence must be using it to "prove the truth of
 10 the matter asserted in the statement." Fed. R. Evid. 801(c)(2). The third party
 11 website printouts introduced by Keating into evidence are being used to show
 12 the landscape of the dental field. For example, the printouts (1) portray dental
 13 professionals' use of terms such as BruxZir, bruxer, brux, zir, and zirconia; (2)
 14 show how dental professionals are promoting the marks and services; and
 15 (3) show instances where Glidewell's mark is being used without a "circle-R"
 16 (®) to denote a registered trademark. (See Docket No. 93 (Eggleston Decl. ¶¶
 17 32-92, Exs. 79-137); Docket No. 91 (Jankowski Decl. ¶¶ 35-40, 44).)

18 Glidewell admits that these are Keating's uses for the evidence. (Docket
 19 No. 115 at 5:15-23.) Keating is not offering the third-party web-page printouts
 20 to prove the truth of the statements on the third-party websites. For example,
 21 many of the websites include laudatory comments about commercial products.
 22 For Keating's purposes, it is irrelevant whether the dental professionals are
 23 being truthful in the services that they offer on their websites or in how they use
 24 words like BruxZir, bruxer, brux, zir or zirconium. It is only relevant that they
 25 are portraying themselves and their products to the public through the use the
 26 words BruxZir, bruxer, brux, zir or zirconium. Accordingly, the website
 27 printouts are not inadmissible as hearsay.

28 ///

E. Keating's Web-Page Printouts Are Not Irrelevant Merely Because They May be Dated after April of 2011

As explained above, in Keating's opposition to Glidewell's Motion *In Limine* No. 1, evidence dated after April 2011 is not categorically irrelevant. (See Keating's Opposition to Glidewell's Motion *In Limine* No. 1, above at Section I.) For those same reasons, Glidewell's Motion *In Limine* No. 2 should be denied.

III. GLIDEWELL'S MOTION *IN LIMINE* NO. 3 SHOULD BE DENIED BECAUSE DR. EGGLESTON'S TESTIMONY IS PROPER UNDER FEDERAL RULE OF EVIDENCE 702

A. Dr. Eggleston's Testimony is Relevant To the Issue of BruxZir's Genericness

Glidewell again argues that any evidence dated after April 2011—the “crucial date” Glidewell asserts that Keating introduced its all-zirconia product into the market using the KDZ Bruxer name—is irrelevant to the determination of whether Glidewell's BruxZir mark was generic as of April 2011.⁵ Thus, Glidewell argues that Dr. Eggleston's testimony regarding the genericness of the terms “bruxzir” and “bruxer” should be excluded because he does not discuss whether those terms were generic in the dental industry as of April 2011. (Glidewell's MIL No. 3 at 1:22-28.) Specifically, Glidewell argues that Dr. Eggleston's testimony does not meet the requirements of F.R.E. 702 “because he relies on no facts or data probative of genericness as of the relevant time period.” (*Id.*) These arguments are meritless.

As discussed in Keating's Opposition to Glidewell's Motion *In Limine* No. 1, evidence dated after April 2011 is not categorically irrelevant. (See

⁵ As explained *supra*, Keating first sold its all-zirconia product in the marketplace under the name KDZ Bruxer on May 10, 2011. (See Section I, above.)

1 Keating's Opposition to Glidewell's Motion *In Limine* No. 1, above at Section
 2 I.) Despite Glidewell's argument to the contrary, *Yellow Cab* stands only for
 3 the proposition that the "crucial date" for determining genericness is the date the
 4 alleged infringer introduced his competing product into the market. *Yellow Cab*
 5 *Co. of Sacramento*, 419 F.3d at 928. The Ninth Circuit did not hold that
 6 evidence dated after the "crucial date" could not be used to prove genericness on
 7 the "crucial date." Nor did it hold that any evidence dated after the "crucial
 8 date" could not possibly "help the trier of fact to understand the evidence or
 9 determine a fact in issue" pursuant to F.R.E. 702(a). Indeed, Glidewell fails to
 10 cite any case where a court excluded evidence dated after the "crucial date" as
 11 irrelevant or unhelpful to the trier of fact as to the determination of genericness
 12 at the time of the "crucial date."

13 Evidence dated after the "crucial date" is relevant to the extent it
 14 corroborates prior evidence.⁶ For example, post-May 2011 evidence can show
 15 that after Keating's entry into the market and after start of this litigation,
 16 Glidewell failed to properly police the use of its mark. This tends to show that
 17 Glidewell has consistently failed to monitor the use of its mark and that it has
 18 not changed any of its practices. The trier of fact may use this to support a
 19 finding that the BruxZir mark, or its phonetic equivalent, has been generic for so
 20 long that Glidewell has no ability to salvage the mark.

21 Establishing a comprehensive timeline of the use of the BruxZir name is
 22 also relevant to understanding the status of BruxZir at the time of Keating's
 23 entry into the market. As detailed in Keating's Reply Memorandum of Points
 24 and Authorities in Support of Defendant's Motion for Summary Judgment

25 ⁶ In footnote 3 of Glidewell's Motion *in limine* No. 3, Glidewell admits there are
 26 at least two documents relied on by Dr. Eggleston evidencing the genericness of
 27 the terms "BruxZir" and "bruxer" before April 2011: (1) a website posting from
 28 Pittman Dental Lab, dated November 29, 2010 (Docket No. 93, Ex. 120); and
 (2) a prescription from Mascola Esthetics in San Antonio (Docket No. 93, Ex.
 110.)

1 Cancelling Glidewell's Trademark Registration (Docket No. 132), evidence
 2 dated after the crucial genericness date is still relevant to the analysis of
 3 genericness. Expert surveys, for example, are necessarily dated after the onset
 4 of litigation (and therefore after the crucial date), but nevertheless are relied
 5 upon considerably in trademark cases. *Committee for Idaho's High Desert v.*
 6 *Yost*, 92 F.3d 814, 822 (9th Cir. 1996) ("survey evidence is . . . one of the most
 7 persuasive ways to prove secondary meaning"); *see also Filipino Yellow Pages,*
 8 *Inc. v. Asian Journal Publ'ns, Inc.*, 198 F.3d 1143, 1151 (9th Cir. 1999)
 9 ("Secondary meaning can be established in many ways, including (but not
 10 limited to) . . . survey evidence See 2 J. Thomas McCarthy, Trademarks
 11 and Unfair Competition § 15:30 (4th ed. 1997)); *Nightlight Sys., Inc., v. Nitelites*
 12 *Franchise Sys., Inc.*, 2007 WL 4563873 (N.D. Ga. 2007) (noting that
 13 deficiencies in the timeliness of a survey does not necessarily bar its
 14 admissibility); *Burger King Corp.*, 705 F. Supp. at 1525 (holding that a survey
 15 taken after the crucial date may not have its validity challenged for that reason).

16 Furthermore, Glidewell's suggestions that Dr. Eggleston's testimony
 17 should be excluded because he did not opine on the primary significance of the
 18 BruxZir mark is equally baseless. The notion that an expert's testimony should
 19 be excluded in its entirety for something s/he *didn't* say (as opposed to the
 20 normal scenario where a party seeks to exclude testimony for something a
 21 witness *did* say,) in his expert reports or declarations is rather strange.

22 Moreover, Dr. Eggleston's testimony, and the evidence he relied on to
 23 provide that testimony, directly addresses the primary significance of the terms
 24 "bruxzir" and "bruxer" to the relevant dental community. Specifically, based on
 25 a plethora of examples of dentists using the terms "bruxer" and "bruxzir" in
 26 promotional materials, prescriptions, and scholarly articles (among other things)
 27 available in the marketplace, Dr. Eggleston concluded "dentists and other
 28 professionals in the dental profession refer to an all-zirconia crown as 'bruxer

1 crown' or alternatively a 'bruxzir crown." (Docket No. 93-1, Ex. 65 at 16-18,
 2 18:23-25.) After reviewing additional evidence regarding the primary
 3 significance of the BruxZir mark, Dr. Eggleston stated, "Dental professional
 4 view "bruxzir" as a reference to a crown made of zirconia, whether or not the
 5 crown was made by Glidewell and whether or not the crown was made from
 6 zirconia made by Glidewell." (Docket No. 93-2, Ex. 66 at 5:17-21; *see also*
 7 Docket No. 93-3, Ex. 67 at 3-5.) In other words, Dr. Eggleston did testify that
 8 the primary significance of the term "bruxzir" was as "a name for a genus of
 9 zirconia dental restoration productions." (Glidewell Motion No. 3 at 10:8-13.)
 10 Accordingly, Dr. Eggleston's expert testimony is directly relevant to the issue of
 11 genericness.

12 **B. Dr. Eggleston's Testimony Is Based on Reliable and Authenticated**
 13 **Sources**

14 In addition, Glidewell finds Dr. Eggleston's testimony to be unreliable
 15 because it is based on "post-April 2011 or undated, unauthenticated hearsay
 16 websites and prescription forms." (Glidewell Motion No. 3 at 10:15-20.)
 17 Glidewell also quibbles that "none of the internet material upon which Dr.
 18 Eggleston relies has been or can be properly authenticated." Accordingly,
 19 Glidewell argues Dr. Eggleston's sources are unreliable and, therefore, his
 20 testimony is unreliable as well. (Glidewell Motion No. 3 at 11:20-28.)

21 However, as discussed in Keating's Opposition to Glidewell's Motion *In*
 22 *Limine* No. 2, the website materials relied on by Dr. Eggleston have been
 23 properly authenticated by both Dr. Eggleston and counsel for Keating. (See
 24 Section II, *supra*; Docket Nos. 135, 138, 139; *Jarritos, Inc.*, 2007 WL 1302506
 25 at *10; *Rearden LLC*, 597 F. Supp. 2d at 1027; *Perfect 10, Inc.*, 213 F. Supp. 2d
 26 at 1153-54 (citing *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000).)
 27 Moreover, Glidewell fails to cite any cases that hold an expert's reliance on
 28 third party website material is grounds for excluding that expert's testimony in

1 its entirety. Glidewell's objections are further baseless because it is well-
 2 established that an expert may rely on hearsay evidence to assist in forming
 3 opinions. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993);
 4 Fed. R. Evid. 703. Here, Keating's expert, Dr. Eggleston, is relying upon
 5 website printouts and dental lab prescription forms in forming his opinion.
 6 More specifically, experts may reasonably rely on third party websites when
 7 forming opinions relating to the use of trademarks.⁷ See Fed. R. Evid. 703.
 8 Accordingly, even if the documents were hearsay—which they are not—the
 9 documents would still be admissible as foundational documents for use by Dr.
 10 Eggleston.

11 Moreover, Dr. Eggleston did not rely only on third-party website
 12 information. He also based his expert opinions on the documents produced
 13 during discovery in this matter, scholarly articles, and his 42 years of experience
 14 in the dental industry, among other things. (Docket Nos. 93-1, 93-2, 93-3.)
 15 Notably, Glidewell does not contest the reliability of these sources.

16 **C. The Probative Value of Dr. Eggleston's Testimony Outweighs Any**
 17 **Prejudicial Effect on Glidewell**

18 Glidewell argues that allowing Dr. Eggleston to testify as to the
 19 genericness of "BruxZir" and "bruxer" poses a substantial risk of unfair
 20 prejudice because the jury would be misled by Dr. Eggleston to determine
 21

22 ⁷ Glidewell cites *Ty Inc. v. Softbelly's Inc.*, No. 00 C 5230, 2006 WL 5111124 at
 23 *1 (N.D. Ill. Apr. 7, 2006) for the proposition that reliance on Internet material
 24 renders expert testimony unreliable. However, in addition to being an out-of-
 25 circuit case, *Ty Inc.* is easily distinguished from this case. In *Ty Inc.*, the trial
 26 court determined the expert testimony was unreliable, not because of the
 27 expert's reliance on Internet material, but because the material was almost
 28 entirely provided by counsel (who had a strong interest in the expert's
 conclusions) and because the search terms used in the Internet searches were too
 narrowly focused and excluded contraindicative results. Here, Dr. Eggleston
 conducted independent Internet research, in addition to his review of scholarly
 articles and the actual practices of dentists in the industry. Glidewell has
 introduced no evidence to show that Dr. Eggleston's research was narrow,
 biased, or unreliable in the same manner as that of the *Ty Inc.*'s expert.

1 genericness at a time period other than the crucial date of April 2011.
 2 (Glidewell's MIL No. 3 at 12-13.) Moreover, Glidewell argues that Dr.
 3 Eggleston's testimony would confuse issues. (*Id.*) These arguments are
 4 baseless.

5 Once the Court decides the "crucial date" for determining genericness,
 6 the Court will communicate that date to the trier of fact, who will readily abide
 7 by that date. Contrary to Glidewell's suggestion, organizing two time frames
 8 (before Keating's entry into the market and after Keating's entry into the
 9 market) is not complicated beyond the abilities of the average person.

10 It is unlikely that anyone would find that concept confusing.

11 **D. Dr. Eggleston Provided Testimony Directly Relevant to the Issue of**
 12 **Likelihood of Confusion**

13 Glidewell argues that Dr. Eggleston has not offered an opinion regarding
 14 the likelihood of confusion as to BruxZir and KDZ Bruxer and, thus, should not
 15 be allowed to offer an opinion on the likelihood of confusion at trial.
 16 (Glidewell's MIL No. 3 at 13-14.) Once again, Glidewell is mistaken. Dr.
 17 Eggleston did provide testimony regarding the likelihood of confusion.

18 The Ninth Circuit's decision in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d
 19 341, 348-49 (9th Cir. 1979), sets out the eight non-exclusive factors for
 20 determining whether there is a likelihood of confusion between marks: (1)
 21 strength or weakness of plaintiff's mark; (2) defendant's use of the mark; (3)
 22 similarity of plaintiff's and defendant's marks; (4) actual confusion; (5)
 23 defendant's intent; (6) marketing/advertising channels; (7) consumer's degree of
 24 care; and (8) product line expansion. Here, Dr. Eggleston addressed a number
 25 of these issues.

26 For example, Dr. Eggleston discussed the similarities between BruxZir
 27 and KDZ Bruxer (Docket No. 93-1 at 14-18.), the strength of Glidewell's mark
 28 (*id.* at 12-18), and Glidewell's use of the mark (*id.* at 12-18). Thus, Dr.

1 Eggleston has offered testimony relevant to the determination of whether there
 2 is a likelihood of confusion between BruxZir and KDZ Bruxer. Accordingly,
 3 Dr. Eggleston's testimony to that effect should not be excluded from trial.

4 For all the foregoing reasons, Glidewell's Motion *In Limine* No. 3 should
 5 be denied.

6 **IV. GLIDEWELL'S MOTION *IN LIMINE* NO. 4 SHOULD BE**
 7 **DENIED BECAUSE LORI BOATRIGHT'S TESTIMONY**
 8 **IS PROPER UNDER FEDERAL RULE OF EVIDENCE 702**

9 Glidewell argues that the testimony of Keating's expert, Lori Boatright
 10 ("Boatright"), should be excluded because (1) she misapplied the Trademark
 11 Manual of Examining Procedure ("TMEP") standards; (2) she provided
 12 improper speculation as to what a trademark examiner should have done in this
 13 matter; and (3) she failed to provide testimony as to the genericness of BruxZir
 14 as of April 2011. Glidewell's criticisms of expert Boatright are meritless.

15 **A. Boatright Did Not Misapply The TMEP**

16 Glidewell argues Boatright misapplied the practices and procedures of the
 17 PTO in her Rebuttal Report to the Report of David J. Franklyn ("Rebuttal
 18 Report") by stating or strongly suggesting the TMEP required the Examiner to
 19 take certain actions in evaluating Glidewell's trademark application for BruxZir.
 20 (Docket No. 94-1.) In support of this argument, Glidewell references three
 21 sentences of one paragraph in Boatright's thirty-page Rebuttal Report. That
 22 paragraph provides:

23 The PTO should have inquired as to whether BRUXZIR had any
 24 meaning in the relevant trade; a proper web search for meaning
 25 by the Examining Attorney would have disclosed 'bruxer' as
 26 having meaning as the intended user of Glidewell's dental
 27 crowns. Had the Examining Attorney learned of this meaning
 28 (of 'bruxer') either by search, by making the proper inquiry, or
 by Glidewell volunteering such information, Glidewell's
 application would then have been refused registration as both

1 ‘merely descriptive’ (initial refusal) and if on the Supplemental
 2 Register or under Section 2(f) of the Trademark Act, then
 3 ‘generic’

4 (Docket No. 94-1 at ¶ 39.)

5 According to Glidewell, “Boatright states that the Examiner did not do a
 6 routine Internet search. But Boatright identifies no requirement for such a
 7 search, nor any evidence that is ‘routine.’” (Glidewell’s MIL No. 4 at 5.)
 8 Glidewell’s interpretation of the report does not comport with its plain meaning.
 9 Boatright merely stated that the Examiner should have made a proper inquiry.
 10 She indicated an Internet search would have revealed the meaning of “bruxer,”
 11 but she did not claim that the TMEP required the Examiner to perform such an
 12 Internet search.

13 Second, citing the same paragraph of Boatright’s Rebuttal Report,
 14 Glidewell fustigates Boatright’s statement that the Examiner “should have
 15 inquired as to whether BRUXZIR had any meaning in the relevant trade.”
 16 (Glidewell’s MIL No. 4 at 5.) Glidewell argues that the Examiner was under no
 17 such obligation. However, as Boatright states in her Rebuttal Report (Docket
 18 No. 94-1 at ¶ 44), TMEP section 814 (Docket No. 139-2) provides:
 19 “[s]ometimes, it is necessary for the examining attorney to request additional
 20 information from an applicant in order to examine the application properly,
 21 pursuant to 37 C.F.R. §2.61(b).” Furthermore, TMEP section 1209.02 (Docket
 22 No. 139-2) provides: “[t]he examining attorney must consider the evidence of
 23 record to determine whether a mark is merely descriptive or whether it is
 24 suggestive or arbitrary. *See In re Noble Co.*, 225 USPQ 749, 750 (TTAB 1985).
 25 The examining attorney may request that the applicant submit additional
 26 explanation or materials to clarify the meaning of the mark or the nature of the
 27 goods or services.” (Docket No. 94-1 at ¶ 44.) Put simply, because the
 28 Examiner is under an obligation to “examine the application properly” and

1 “consider the evidence of record to determine whether a mark is merely
2 descriptive,” Boatright’s statement that the Examiner should have made a proper
3 inquiry as to the meaning of BruxZir is consistent with the TMEP.

4 Third, Glidewell argues that Boatright suggested Glidewell
5 “hoodwinked” the Examiner by failing to disclose the meaning of “BruxZir.”
6 (Glidewell’s MIL No. 4 at 6.) However, Boatright did not state or even suggest
7 that Glidewell was obligated by the TMEP to disclose the meaning of the term
8 “BruxZir.”

9 Overall, even if Glidewell’s criticisms were well-founded (which they are
10 not), Glidewell’s objections to three sentences of one paragraph of Boatright’s
11 thirty-page Rebuttal Report are not sufficient to exclude Boatright’s entire
12 testimony from trial.

13 **B. Boatright’s Testimony is Not Unsupported Speculation**

14 Glidewell argues Boatright’s testimony regarding the steps the Examining
15 Attorney normally takes, and should have taken in reviewing Glidewell’s
16 trademark application for BruxZir, is unsupported speculation. (Glidewell’s
17 MIL No. 4 at 6.) Glidewell argues that the majority of Boatright’s Rebuttal
18 Report merely states what the Examining Attorney should have done in
19 reviewing Glidewell’s trademark application. However, Glidewell only cites
20 three sentences from Boatright’s Rebuttal Report in support of its claim. (*Id.* at
21 5-6.) Moreover, the only case law Glidewell cites is either out of circuit or
22 unreported.

23 Furthermore, Boatright’s statements are not unsupported opinion. Her
24 conclusions about what the Trademark Examining Attorney in this case should
25 have done are based on her experience as a Trademark Examining Attorney at
26 the U.S. Patent & Trademark Office (“USPTO”), where she examined over
27 2,500 trademark applications, and her decades of experience working with
28 trademark applications and law. (Docket No. 94-1 ¶¶ 4-9.) Indeed, Boatright’s

1 testimony regarding the trademark approval process is directly relevant to the
 2 claims at issue in this case, including Keating's Fourth Counterclaim for
 3 Cancellation of Glidewell's BruxZir trademark registration. Moreover,
 4 Boatright's testimony will assist the trier of fact in understanding the issues in
 5 this case.

6 **C. Boatright's Testimony is Relevant To the Issue of BruxZir's**
 7 **Genericness**

8 Glidewell argues that Boatright's testimony is irrelevant because she does
 9 not address whether the terms "bruxer" and "BruxZir" were generic at the
 10 crucial date of April 2011. (Glidewell's MIL No. 4 at 10.) This claim is
 11 meritless.

12 As discussed in Keating's Opposition to Glidewell's Motion *In Limine*
 13 No. 1, evidence dated after April 2011 is not categorically irrelevant. (See
 14 Keating's Opposition to Glidewell's Motion *In Limine* No. 1, above at Section
 15 I.) Despite Glidewell's claims to the contrary, *Yellow Cab* stands only for the
 16 proposition that the "crucial date" for determining genericness is the date the
 17 alleged infringer introduced his competing product into the market. *Yellow Cab*
 18 *Co. of Sacramento*, 419 F.3d at 928. The Ninth Circuit did not hold that
 19 evidence dated after the "crucial date" could not be used to prove genericness on
 20 the "crucial date." Nor did it hold that any evidence dated after the "crucial
 21 date" could not possibly "help the trier of fact to understand the evidence or
 22 determine a fact in issue" pursuant to F.R.E. 702(a). Indeed, Glidewell fails to
 23 cite any case where a court excluded evidence dated after the "crucial date" as
 24 irrelevant or unhelpful to the trier of fact as to the determination of genericness
 25 at the time of the "crucial date."

26 Evidence dated after the "crucial date" is relevant to the extent it
 27 corroborates prior evidence. For example, post-May 2011 evidence can show
 28 that after Keating's entry into the market and after start of this litigation,

1 Glidewell failed to properly police the use of its mark. This tends to show that
 2 Glidewell has consistently failed to monitor the use of its mark and that it has
 3 not changed any of its practices. The trier of fact may use this to support a
 4 finding that the BruxZir mark, or its phonetic equivalent, has been generic for so
 5 long that Glidewell has no ability to salvage the mark.

6 Establishing a comprehensive timeline of the use of the BruxZir name is
 7 also relevant to understanding the status of BruxZir at the time of Keating's
 8 entry into the market. As detailed in Keating's Reply Memorandum of Points
 9 and Authorities in Support of Defendant's Motion for Summary Judgment
 10 Cancelling Glidewell's Trademark Registration (Docket No. 132), evidence
 11 dated after the crucial genericness date is still relevant to the analysis of
 12 genericness. Expert surveys, for example, are necessarily dated after the onset
 13 of litigation (and therefore after the crucial date), but nevertheless are relied
 14 upon considerably in trademark cases. *Committee for Idaho's High Desert*, 92
 15 F.3d at 822 ("survey evidence is . . . one of the most persuasive ways to prove
 16 secondary meaning"); *see also Filipino Yellow Pages, Inc.*, 198 F.3d at 1151
 17 ("Secondary meaning can be established in many ways, including (but not
 18 limited to) . . . survey evidence See 2 J. Thomas McCarthy, Trademarks
 19 and Unfair Competition § 15:30 (4th ed. 1997)); *Nightlight Sys., Inc., v. Nitelites*
 20 *Franchise Sys., Inc.*, 2007 WL 4563873 (N.D. Ga. 2007) (noting that
 21 deficiencies in the timeliness of a survey does not necessarily bar its
 22 admissibility); *Burger King Corp.*, 705 F. Supp. at 1525 (holding that a survey
 23 taken after the crucial date may not have its validity challenged for that reason).

24 **D. The Probative Value of Boatright's Testimony Outweighs Any**
 25 **Prejudicial Effect on Glidewell**

26 Glidewell argues that allowing Boatright to testify as to the genericness of
 27 "BruxZir" and "bruxer" poses a substantial risk of unfair prejudice because the
 28 jury would be misled by Boatright to determine genericness at a time period

1 other than the crucial date of April 2011. (Glidewell's MIL No. 4 at 12-13.)
 2 Glidewell also argues that Dr. Eggleston's testimony would confuse issues.
 3 (*Id.*) Glidewell's arguments are baseless.

4 Once the Court decides the "crucial date" for determining genericness,
 5 the Court will communicate that date to the trier of fact, who will readily abide
 6 by that date. Contrary to Glidewell's suggestion, organizing two time frames
 7 (before Keating's entry into the market using the KDZ Bruxer name and after
 8 that entry) is not complicated beyond the abilities of the average person.

9 It is unlikely that anyone would find that concept confusing.

10 **E. Boatright Provided Testimony Directly Relevant to the Issue of**
 11 **Likelihood of Confusion**

12 Glidewell also argues that Boatright's trial testimony regarding the
 13 likelihood of confusion as to BruxZir and KDZ Bruxer should be limited to the
 14 opinions she disclosed in her expert report. (Glidewell's MIL No. 4 at 13.)
 15 Keating disagrees. Boatright should be able to provide testimony on the topics
 16 addressed in her declarations as well. (Docket Nos. 94 and 130.)

17 For all of the foregoing reasons, Glidewell's Motion *In Limine* No. 4
 18 should be denied.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **V. CONCLUSION**

2 In conclusion, for the foregoing reasons, Keating respectfully requests
3 that the Court deny Glidewell's Motions *In Limine* Nos. 1–4.

4 Respectfully submitted,
5 KNOBBE, MARTENS, OLSON & BEAR, LLP

6 Dated: January 18, 2013

By: /s/ David G. Jankowski

7 Darrell L. Olson
8 Lynda J. Zadra-Symes
9 Jeffrey L. Van Hoosear
10 David G. Jankowski

11 ENTERPRISE COUNSEL GROUP ALC

12 David A. Robinson
13 James S. Azadian

14 Attorneys for Defendant and Counter-Plaintiff
15 KEATING DENTAL ARTS, INC.
16
17
18
19
20
21
22
23
24
25
26
27
28